

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**DAVID SAXE PRODUCTIONS, LLC and
VEGAS! THE SHOW, LLC, Joint Employers**

and

Case 28-CA-075461

**DAVID SAXE PRODUCTIONS, LLC, and
FAB FOUR LIVE, LLC, Joint Employers**

and

Case 28-CA-084151

ANNE TRACY CARTER, an Individual

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

Respectfully submitted,

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I. INTRODUCTION

On May 8, 2013, the Administrative Law Judge Eleanor Laws (the ALJ) issued a decision in this matter. Notwithstanding the ALJ's crediting of Charging Party Anne T. Carter (Carter) and the ALJ's findings that Respondents committed multiple violations of 8(a)(1) and asserted shifting defenses, and that principle decision-maker David Saxe was not credible, the ALJ erroneously concluded that Carter would have been discharged regardless of her protected concerted activities. In December 2011, Carter and other employees confronted Saxe about holiday pay, scheduling, rehearsal pay, and injury issues. Saxe reacted negatively and disparaged and impliedly threatened employees. About a week after this meeting, Saxe discharged Carter from both Vegas! The Show and the BeatleShow. At trial, Saxe initially claimed that Carter complained too much in the dressing room and then denied that was the reason, stating that Carter's discharge was due to her dance style. Despite her own finding that this testimony was inconsistent and involved protected concerted activities, the ALJ credited Saxe's claim that Carter complained too much in the dressing room even after finding that some of the complaining was protected concerted activity. The ALJ ignored Respondent's decision to renew and extend her contract twice and Saxe's decision to hire her to dance in the BeatleShow just six months before her discharge. The Board should overrule the ALJ's finding and conclude that Carter was discharged from Respondents' shows due to her protected concerted activities.

II. FACTS

A. The Companies

David Saxe (Saxe) is the owner and managing member of Vegas! The Show, LLC, the limited liability company that produces Vegas! The Show. (ALJD p. 2, lines 22-24)¹ Saxe was the equal co-owner with Mick McCoy (McCoy) of Fab Four Live, LLC, the limited liability company that produced the BeatleShow. (ALJD p. 2, lines 26-27) The shows were each performed at the Saxe Theater (Theater) in the Miracle Mile shops at the Planet Hollywood Hotel. (Tr. 41)

B. Carter's Employment with Respondents

On April 20, 2010, dancers including Carter, auditioned for Vegas! The Show before Saxe and choreographer Tiger Martina (Martina)². (ALJD, p. 4, lines 25-27; Tr. 88, 220, 641) At every audition, Tiger and Saxe told dancers that this is a "real show" and a "dancing show." (Tr. 470) Vegas! The Show was very athletic and demanding. (Tr. 642) From late April until June 2010, rehearsals led by Martina were held at the David Sax Productions, LLC (DSP) facility at 920 South Commerce in Las Vegas, Nevada. (ALJD, p. 4, lines 4-6; Tr. 89-90, 220) On April 27, 2010, Carter signed an artist's agreement that provided a rate of pay of \$70.84 per show. (GCX 14) The contract provides that rehearsals were compensated at the rate of \$12.50 per hour before the first live performance and not compensated thereafter with a limit of four rehearsal hours per week. (ALJD, p. 4, lines 36-37; GCX 14, p. 2)

¹ GCX__ refers to General Counsel's Exhibit followed by the exhibit number; RX__ refers to Respondent's Exhibit followed by exhibit number. "Tr. __:__" refers to transcript page held October 16-18, 2012 and December 11-12, 2012. "ALJ" refers to Administrative Law Judge and ALJD refers to the Decision of the Administrative Law Judge issued on May 7, 2013. All abbreviations are consistent with those in the ALJD.

² After the rehearsal process, Martina has not been consistently at Vegas! The Show. (Tr. 677)

Vegas! The Show had a soft opening on June 24, 2010, followed by a grand opening on August 5, 2010. (ALJD, p. 5, line 16; Tr. 94-95) Initially, performances were six days per week. However, soon after opening the show ran seven days per week with dancers performing six days per week. (Tr. 93) Each night, the dancers performed a show at 7:00 PM and another at 9:00 PM. The shows would run about one hour and 20 minutes. (ALJD, p. 5, lines 17-18; Tr. 93) Vegas! The Show was a high intensity performance about the history of Vegas entertainment. (ALJD p. 2, lines 24-26; Tr. 94)

Carter reported to dance captains Ryan Kelsey (Kelsey), Claudia Mitria (Mitria), and Darlene Ryan (Ryan) who served as company and production Manager. (ALJD, p. 5, lines 34, 37-38; Tr. 96, 223) Kelsey and Mitria were directly in charge of the dance cast and were responsible for how Vegas! The Show would run, maintaining the integrity of the show, and some of the scheduling. (ALJD, p. 5, line 40-41; Tr. 98, 246, 287, 290, 327) It was part of the dance captains' job to make independent recommendations about whether to renew a dancer at the end of the six-month contracts. (ALJD, p. 6, lines 2, 25-26; Tr. 299, 349, 367, 507) Kelsey earned \$100 per show, and Mitria earned \$83.34 per show. (Tr. 251)

Employees were required to report by 6:00 PM when there was a nightly meeting. (Tr. 98, 104) At the meeting, Kelsey and Mitria gave Carter and the other dancers "notes," which were corrections to improve the dance performance. (Tr. 98, 143, 171, 227, 244, 291, 326) Carter received notes about dance style and her not performing move at the correct count of the music. (Tr. 157, 194-95, 207) According to Mitria, Carter was no more vocal about receiving notes than the other dancers. (Tr. 348) Mitria testified that sometimes Carter took notes fine and sometimes she asked more questions, which was "not a bad thing." (ALJD, p. 7, lines 16-17; Tr. 339)

After the initial rehearsal process ended, Saxe would appear at the Theater during Vegas! The Show about two times per month. (Tr. 97, 151, 655) He did not have much interaction with Carter. (Tr. 520) Auditions for Vegas! The Show were ongoing and it was very common to have dancers re-audition for their spots. (Tr. 474, 478, 576)

On December 26, 2010, Carter signed a second contract with a rate of pay of \$65.84 per show with a bonus of \$5.00 per show, provided that she complied with the “Duties of the Artist requirements.” (ALJD, p. 7, lines 33-34; GCX 15) In signing the contract, Carter met with Production Manager Ryan and DSP General Manager Matthew Resler (Resler) in his office at DSP regarding the signing of the contract. (Tr. 169, 696) Neither Resler nor Ryan counseled Carter about her performance or attitude. (Tr. 169, 171, 696, 706)

Carter received all of her bonus pay. (Tr. 250) She never received a written counseling during her employment with Respondents. (Tr. 169) On April 26, 2011, Carter signed an extension of the earlier agreement, which was set to expire on January 2, 2012. (GCX 16)

C. The Contract

Many contracts, including Carter’s and Dancer Amanda Nowak’s (Nowak), include the following clauses:

NONDISCLOSURE/NONDISPARAGEMENT. Artist agrees not to disclose the terms of this Agreement to third parties or fellow Artists without Company’s prior written consent. Once again, Artist may not disclose Artists compensation or solicit information regarding anyone else’s compensation or other terms of their agreements. If this occurs, Company shall not have the right to immediately terminate this agreement and collect damages as set forth in section 6 of this agreement. Artist shall agree not to disparage each other to any person in the media or any manor during the terms of this agreement and continuing for ten (10) years thereafter.

NON-UNION. Artist acknowledges that the Show is not under the jurisdiction of any labor union. (ALJD, p. 6, lines 33-40; p. 7, lines 1-9; GCX 15, p. 4; GCX 16, p.4; GC 32, p. 4; Tr. 72)

The contracts provide that violating the confidentiality provisions regarding salaries or personnel matters is a breach of the agreement. (ALJD, p. 5, lines 2-3; GCX 15, p. 4; GC 31, p. 2) The contracts dancers could be terminated by Vegas! The Show, LLC with two weeks written notice without cause and employees could be released from the contracts with 30 days notice. (ALJD, p. 4, lines 37-39; GCX 14, 15, 31, 32; Tr. 575) Vegas! The Show, LLC had the right to terminate the contracts “without notice in the event of breach by the employee of any covenant contained” therein or for insubordination. (ALJD, p. 4 line 43; p. 5, line 1; GCX 14, p. 2 GCX 15, p. 4; GCX 30, p. 2; GCX 31, p. 3)

In the spring of 2011, McCoy and Saxe decided to use dancers from Vegas! The Show in the BeatleShow because they were looking for better dancers to be and the dancers already had dressing room space at the Theater. (Tr. 454) The dancers learned about The BeatleShow positions when Ryan came into the dressing room for the Show, and said that Saxe wanted to use dancers from Vegas! The Show for the BeatleShow. (ALJD, p. 7, lines 32-33; Tr. 101) A few of the dancers volunteered, and Ryan informed Carter that she and Montece Mask would be dancing in the show. (ALJD, p. 7, lines 33-35; Tr. 102) Ryan directed them to attend rehearsals with Tiger Martina at DSP. (ALJD, p. 7, line 37; Tr. 102) During the rehearsals, Carter asked Martina if there were going to be contracts and if they were going to be paid for their rehearsal time, and Martina directed Carter to ask Ryan. (Tr. 103, 154)

The BeatleShow included two female dancers and was a less rigorous show than Vegas! The Show. (Tr. 103-04, 437) Ryan told Carter that the dancers needed to be there at 5:00 PM for the 5:30 PM show that ended about 15 to 20 minutes before 7:00 PM. (ALJD, p. 7, lines 38-39; Tr. 56, 104, 155) Martina told the dancers what style to create for their hair and make-up. (Tr. 105) At Ryan’s direction, the dancers created their own schedules until dancer

Anna Van Sambeck (Van Sambeck) was appointed to do the scheduling. (ALJD, p. 7, lines 37-38; Tr. 153-54, 217, 274)

During the BeatleShow, dancers were asked to roll a large prop in the shape of an arrow off of the stage. (ALJD, p. 8, lines 2-4; Tr. 111, 216) Carter was concerned because the arrow had fallen on dancer Van Sambeck's head. (Tr. 111, 275) A few of the dancers were unhappy about moving the arrow. (ALJD, p. 8, lines 5-7; Tr. 276) Sometimes the dancers did not move the arrow when they were in the track that performed on stage left, where Carter danced. (Tr. 156) Carter asked Ryan to about whether she had to move the prop. (Tr. 112) McCoy spoke to Carter and said that she would have to move the arrow, or he would find someone else who would do it. (ALJ, p. 8, lines 4-5; Tr. 113) After this conversation, Carter moved the arrow. (Tr. 113)

D. December 13, 2011 Meeting with David Saxe

1. Events Leading Up to December 13 Meeting

Around late November 2011, Ryan was discharged.³ After she left, there was a lot of concern and speculation among the cast and staff because Ryan was the person to whom employees brought their work-related issues. (ALJD, p. 8, lines 28-29; Tr. 113-14, 158, 160, 226, 388-89) The show was more chaotic. (Tr. 312) Kelsey and Mitria took over the scheduling and Ryan's other duties. (ALJD, p. 5, line 5; p. 6, lines 1-2; Tr. 312, 327) At that time, a lot of the cast were injured and the part-time hires prevented the full-time cast from taking time off. (Tr. 114, 226) Employees were concerned about having enough time between shows to prepare for the next performance because shows did not always start on time, and the "meet-and-greets" required dancers to meet with the public in between shows. (Tr. 114, 226)

³ Joy Schaffer was Ryan's successor. (Tr. 303) The record does not indicate when she started her employment, and Saxe denied that there was ever another company manager. (Tr. 591)

Carter was the most vocal of the dancers about work concerns including holiday pay, part-time employees an schedules, rehearsal pay, injuries, and meet-and-greets. (Tr. 361, 365, 389, 409) Carter spoke to Mitria about how to resolve these issues, and she suggested that they talk to Saxe. (Tr. 114, 176) On December 11, 2011, Carter approached Saxe’s assistant Armando Macias, Project Manager for DSP, about having the employees meet with Saxe. (ALJD, p. 8, line 30; GC 9; Tr. 113-14)

2. December 13 Meeting

On December 13, 2011, Saxe came into the girls’ dressing room and held a meeting. It was not common for Saxe to address a whole group of dancers. (ALJD, p. 8, lines 31-32; Tr. 364-365) About 10 female dancers were present, and Kelsey walked into the dressing room during the meeting. (Tr. 115) The dancers were sitting at their dressing room stations, and Saxe sat in the middle. (ALJD, p. 9, lines 15-17; GCX 47; Tr. 510, 701-02) Saxe said that he heard that morale was low, and he wanted it to be a positive environment. (Tr. 115) Carter said that of course, morale was low; Ryan had just been fired and that over the past couple of years, Vegas! The Show, LLC had lost a lot of employees and everybody was wondering who was going to be next and what was going to happen. (ALJD, p. 8, lines 33-34; Tr. 115) Saxe said that Ryan was fired because she was not filling out the nightly show reports and said, “fuck you” in an argument. (Tr. 115, 228) Carter said that they were not really interested in why she was fired or whether or not she was doing her job, but as a cast, they were interested in getting someone in there who can open up the lines of communication and have a chain of command so employees could voice their issues. (Tr. 115-16, 228) Saxe asked what the concerns were. (ALJD, p. 8, lines 34-35; Tr. 116, 228) Dancer Natasha Boychoure (Boychoure) asked for incentives for those who had been there since the beginning. (Tr. 116) She stated that they worked hard and

that they work every holiday and would like holiday pay. (ALJD, p. 8, lines 35-37; Tr. 116, 228) Saxe said, “why are you bitching, what does your contract say about rehearsal and holiday pay?” (ALJD, p. 8, lines 37-38; Tr. 117, 228) Nowak said that she did not think that Boychoure was bitching and that Saxe said that he was there to communicate. (ALJD, p. 9, lines 4-5; Tr. 228-29) Boychoure said, “you know we’re not bitching, we love our jobs, we work extremely hard.” Boychoure said that the contract did mention nights that they only do one show and that they were supposed to be given time-and-a-half but they never received it. (ALJD, p. 8, lines 38-39; p. 9, line 1; Tr. 117) Saxe said that they did receive it and that rehearsal time would be compensated. (Tr. 117) Kelsey said that the dancers’ first four hours of rehearsal are free. (Tr. 1170) Carter said that that was not what is in their current contract. (Tr. 117) Carter said that Saxe must get away with not paying for rehearsals because the contract says that “it is up to his discretion.” (Tr. 117) Saxe said, “all you do is bitch, bitch, bitch I give you a job and all you do is bitch.” (ALJD, p. 9, lines 3-5; Tr. 117, 180, 228)

Carter said, “we love our jobs, we are grateful to have our jobs, we enjoy working here, however, there are concerns that we have.” (ALJD, p. 9, lines 5-6; Tr. 118) Carter said that the part-time dancers were affecting each of the cast members, especially since a lot of them were injured at the time. (Tr. 118) Carter said that having part time employees come in three or four days per week was causing those of them that are there to six days per week to be unable to attend to injuries and illnesses. (Tr. 118, 229) Saxe said that he provided insurance. (Tr. 118) Carter said that that does not cover everything and that she needed to see a physical therapist twice per week as did other cast members. (Tr. 118) Saxe said that he wanted dancers with a positive attitude and that Vegas! The Show was their top priority. (Tr. 118) Carter said, “you

can't justify hiring people part-time that have other employment and still say that Vegas! The Show is their top priority." (Tr. 119, 230) Saxe said that he would look into it.

Carter said that meet-and-greets were affecting time constraints and that those constraints were aggravated by shows that started late. (ALJD, p. 9, lines 8-9; Tr. 120, 229-30, 239) Saxe said that he understood, but he didn't want all this "bitching." (ALJD, p. 9, lines 10-12; Tr. 120) Out of all the dancers, Carter spoke up the most at this meeting. (ALJD, p. 9, lines 12-13; Tr. 245)

E. Carter's Discharges

1. Email Exchange

About a week after the December 13, 2011 meeting, Carter noticed Saxe meeting with other dancers about their contracts. (ALJD, p. 9, lines 32-33; Tr. 120-21) On December 21, 2011, she contacted Saxe via email: "Hi David, I didn't get a chance to talk to you yesterday, I was wondering if there will be another time to do that or if I can schedule a time? Thanks, Anne Carter." (ALJD, p. 9, lines 33-35) At 7:59 PM, Saxe emailed her back:

Hi Anne, due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas! The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it if you could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just can't be tolerated anymore. Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night. David Saxe (ALJD, p. 10, lines 1-8; GCX 20)

Carter saw the headline of message stating "not renewing you" when she was in dressing room during a performance and continued with her performance. (ALJD, p. 10, lines 10-11; Tr. 122, 699, 708)

2. Telephone Conversations

On about December 23, 2011, Carter called Saxe. Carter said that she was blind-sided by what happened, that she did not understand, that she was an original cast member who had been very loyal, that she enjoyed her job, and that she just did not understand. (ALJD, p. 10, line 13; Tr. 122) Saxe said that of course someone like her would be blind-sided and would not understand. (ALJD, p. 10, lines 14-15; Tr. 122) Saxe said that he knew her type and all she did was bitch. (Tr. 122, 211) Saxe said that she is the most negative person in the dressing room and all the cast members could not stand her. (Tr. 122) Saxe said that the choreographer thinks that she is “a pain in the ass.” (ALJD, p. 10, lines 15-16; Tr. 123) Carter asked how he could say that the cast members did not like her when the entire cast was at her Christmas Party three nights ago.⁴ Carter said that she finds it hard to believe and that as far as her performance, there was nothing lackluster. (ALJD, p. 10, lines 17-18; Tr. 123) Carter said that she was a professional and would complete her contract. (ALJD, p. 10, lines 18-19; Tr. 123)

Saxe called back and asked if she would be coming to work that night. (ALJD, p. 10, lines 36-38; Tr. 123) Carter said that she was a professional and planned on completing her contract. (Tr. 123) Saxe said that he did not think that Carter was showing up for work so he took her off the BeatleShow. (ALJD, p. 10, lines 37-38; Tr. 123) Carter was not scheduled to perform in the BeatleShow after this conversation. (Tr. 217)

3. Conversations with Mitria and Kelsey

A couple of days later, Carter approached Mitria and said that she was completely blind-sided by what happened. (ALJD, p. 10, lines 40-41; Tr. 124, 215) Carter said that if there was something with her performance, attitude, or whatever, she would have hoped that Mitria would have let Carter know. (Tr. 124) Carter said that as a friend, if there was something that she was

⁴ Numerous cast members had been at Carter’s party, including Mitria and Kelsey. (Tr. 179, 316, 360)

doing that was severe enough to cause her to lose her employment, Mitria should have let Carter know. (Tr. 124) Mitria said that any concerns she had, she had voiced to Ryan. Carter said that Ryan had not told her anything. (Tr. 124) Mitria said that she was so sorry. (ALJD, p. 10, lines 41-42; Tr. 124)

Carter approached Kelsey and said he that he heard through the grape vine what had happened and that he was glad she approached him. (Tr. 125, 215) Carter asked why he gave her no warning. Kelsey said that as far as performance is concerned, she was “amazing” and always “gave” great energy and a great show. (ALJD, p. 10, lines 42-43; Tr. 125) Carter said that she knew that she was outspoken and that she spoke up a lot and that any concerns were because she cared about the show and it was for the greater good of the cast. (Tr. 125) Carter said that it was never out of negativity and during the meeting with Saxe, she tried to voice those concerns in a positive manner. (ALJD, p. 10, lines 43-45; Tr. 125) Kelsey said that unfortunately Saxe “flies off the handle and doesn’t like it when people talk back to him”. (ALJD, p. 10, lines 45-46; Tr. 125, 215) Kelsey said that he was sorry about that. (Tr. 125) Carter said that she could not believe that Saxe said that the entire cast hated her. (Tr. 125) Kelsey said, “you know that that’s not true.” Kelsey said that he hoped that their friendship was not affected by this. (Tr. 125)

4. Carter’s Performances and Attitude

Carter worked until the end of her contract. (Tr. 127) During her employment, no one ever informed her that she had to improve her dancing or her contract would not be renewed. (Tr. 162) Carter was well-liked, got along with everyone and had a good attitude. (Tr. 233, 245-46) Carter was a “full-out” dancer who always gave 110%. (Tr. 233, 244-45) Jennaia Roussel (Roussel) testified that Carter had a good sense of humor and that she never communicated to

Carter any concerns about Carter being too negative. (Tr. 382) According to Martina, Carter's spacing was typically good, and she had good energy levels. (Tr. 688) Dancers including Mitria and Kelsey attended Carter's Christmas Party in December 2011. (ALJD, p. 11, lines 33-35; Tr. 316, 360) Mitria never told Carter that cast members thought that she was too negative. (Tr. 344)

F. The Decision of the Administrative Law Judge

The trial took place on October 16-18, and December 11-12, 2012. On May 7, 2013, the ALJ issued the ALJD. The ALJ found that DSP and Vegas! The Show, LLC and DSP and Fab Four Live, LLC are single employers, respectively. (ALJD, p. 24-35) The ALJ made no finding as to whether they are joint employers and stated that it was unnecessary to determine if Mitria and Kelsey are statutory supervisors (ALJD, p. 13, lines 31-32), despite relying on their testimony throughout the ALJD. The ALJ concluded that Respondent maintained a contract provision prohibiting employees from discussing information relating to wages, hours and working conditions and another one that required employees to acknowledge that Vegas! The Show, LLC is not under the jurisdiction of a labor union. (ALJD, p. 14, lines 27-28; p. 15, lines 24-25) The ALJ further credited Carter and Nowak over Saxe regarding what happened during the December 13, 2013 meeting. (ALJD, p. 17, lines 1-3) The ALJ found that the employees were engaged in protected concerted activity during the December 13, 2013 meeting, and that Saxe violated Section 8(a)(1) of the Act by prohibiting employees from engaging in protected activity and disparaging their protected activity. (ALJD, p. 17, lines 15-18) The ALJ concluded that Saxe clearly "did not welcome complaints" threatened employees with discipline for their engaging in protected concerted activity. (ALJD, p. 18, lines 1-3) However, the ALJ

found that Saxe's prohibition of concerted activity was the same as issuing a rule in that regard, and did not find an additional violation as alleged in paragraph 4(c)(6). (ALJD, p. 18, lines 7-11)

The ALJ found that Carter's protected concerted activities were a motivating factor in the decision to let her contract expire. (ALJD, p. 21, lines 36-37) In doing so, the ALJ also found that the discharge email was violated Section 8(a)(1). The ALJ concluded that Saxe's asserted reasons for discharging Carter were "somewhat of a moving target" and that Saxe "has provided inconsistent testimony as to his reasons for failing to renew Carter's contract." (ALJD, p. 20, line 11; p. 24, lines 14-15) In so noting, the ALJ found that Saxe's first asserted defenses: that Carter first complained too much, and his second defense (asserted after the break in the hearing) that she did not have the correct style did not motivate his decision not to renew Carter's contract did not motivate Saxe's decision not to renew Carter's contract. (ALJD, p. 20, lines 16-18). The ALJ concluded that Saxe's claim that he decided not to renew Carter's contract in October 2011, was inconsistent with Kelsey's testimony that Saxe asked for his input after the December 13 meeting and Mitria's testimony that Carter's dance ability was not in question. (ALJD, p. 20, lines 29-26) The ALJ then described other reasons that Saxe's testimony was not credible. (ALJD, p. 20-21) The ALJ noted the timing of Carter's discharge and Kelsey's admission that "Unfortunately David (Saxe) flies off the handle and doesn't like it when people talk back to him." (ALJ, p. 21, lines 19-22, 25-26)

Although the ALJ discredited Saxe and his asserted defenses, while analyzing Respondents' *Wright Line* defenses, she credited Tiger Martina discredited Saxe's version of events. (ALJD, p. 22, lines 30-32) The "second version of events" was that Saxe made his decision not to renew Carter's contract in October 2011, and was primarily concerned about her dancing. With this version of events discredited, the ALJ credited Saxe's contention that Carter

complained too much, which caused a “negative atmosphere” backstage. (ALJD, p. 22, lines 34-36) The ALJ noted that although it is a fine line, co-workers complaints about a fellow employee’s constant complaining about work and working conditions can be a legitimate consideration. (ALJD, p. 23, lines 22-25) Although she discredited Saxe’s version of events that was consistent with Martina’s testimony about their making the decision to let Carter’s contract expire, she continued to assert Martina’s problems with Carter’s dance style. (ALJD, p. 33-36) The ALJ concluded that Respondents did not condone Carter’s alleged poor performance and attitude. (ALJD, p. 23, lines 38-39) The ALJ reiterated that “[t]hat Saxe, the ultimate decision-maker, has provided inconsistent testimony as to his reasons for failing to renew Carter’s contract is very troubling” and stated that the outcome would favor Carter if the ALJ solely weighed Saxe’s and Carter’s testimony. (ALJD, p. 24, lines 14-16)

The ALJ concluded that Carter was an employee of the BeatleShow. (ALJD, p. 26, lines 1-2) The ALJ found that Carter engaged in protected concerted activity when she complained about moving the arrow. (ALJD, p. 26, lines 25-27) Finally, the ALJ concluded that the non-renewal of Carter’s contract by Vegas! The Show “spurred the decision to discharge her from the BeatleShow” and Mick McCoy did not independently retaliate against her. Thus, Respondents’ discharge of Carter from the BeatleShow was not a violation of Section 8(a)(1) (ALJD, p. 26, lines 46-47; p. 27, lines 1-4)

III. ARGUMENT

A. **The ALJ erred in failing to find that Respondents DSP and Vegas! The Show, LLC discharged Anne Carter in violation of Section 8(a)(1) of the Act. (Exceptions 6-37)**

1. **The ALJ should not have analyzed and credited Respondents' *Wright Line* defenses after finding Respondents' asserted reasons for the discharge were false**

The ALJ correctly found that Carter's protected concerted activities were a motivating factor in the decision to let her contract expire. (ALJD, p. 21, lines 36-37) The ALJ concluded that Saxe's asserted reasons for discharging Carter were "somewhat of a moving target" and that Saxe "has provided inconsistent testimony as to his reasons for failing to renew Carter's contract." (ALJD, p. 20, line 11; p. 24, lines 14-15) In other words, Saxe's asserted defenses are false. If the trier of fact determines the stated motive for a discharge is false, she can infer that the motive is one the Employer "desires to conceal – an unlawful motive – at least where, as in this case, the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Similarly, shifting defenses, as the ALJ described as "somewhat of a moving target," are evidence to support a finding that the real reason for the action is protected activity. *Winges Company, Inc.*, 263 NLRB 152, 156 (1982); *Pilgrim Life Insurance Co.*, 249 NLRB 1228, 1245-1246 (1980). As evidenced by the other unfair labor practices, including the discharge email and the timing of the discharge, the ALJ was correct in making an inference that the stated reasons for discharging Carter were false, and thus, constitutes additional evidence that Saxe discharged her from Vegas! The Show and the BeatleShow due to her protected concerted activity and that the various and differing reasons given were pretextual.

However, the ALJ erred when she concluded that the burden of persuasion shifts to Respondents to show that Carter should have been discharged absent her protected concerted activity. (ALJD, p. 21, lines 38; p. 22, lines 1-2) As the Board concluded in *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982), it is not necessary to “achieve formulaic consistency with *Wright Line*⁵ . . . where the administrative law judge has concluded that the proffered explanation is pretextual.” The Board continued, “For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of a wrongful motive established by the General Counsel.” *Id.* “If the evidence establishes that the reasons given for Respondent’s action are pretextual –that is, either false or not relied upon – Respondent fails by definition to show it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). It is not logical to find Respondent’s multiple defenses false, and then credit one of them as a defense to the acting General Counsel’s prima facie case. The ALJ found repeatedly that Saxe, the decision maker, was not credible and that the reasons given for discharging Carter were discredited. These findings not only establish the prima facie case, but they also nullify Respondents’ defenses as pretextual. The ALJ should not have analyzed Respondents’ discredited defenses after finding them false.

2. The ALJ cannot discredit Saxe and then recredit his testimony for Respondents’ defense

After discrediting Saxe, the ALJ stated that she was going to discredit Saxe’s later version of events, and then essentially credited Saxe’s testimony about Carter’s complaining too

⁵ *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (CA1 1981).

much in the dressing room.⁶ The ALJ cannot both discredit and credit Saxe's first version of events. These reasons are false. Once the ALJ has discredited Saxe's testimony regarding the subject, she cannot recredit some of his testimony and rely upon it to find that he would have discharged Carter anyway.

The ALJ attempts to make Martina's credited testimony consistent with Saxe's testimony. (ALJD, p. 22, lines 19-28) However, it is also Martina's version of events that the ALJ was discrediting by discrediting "Saxe's later version of events." (ALJD, p. 22, line 32) Specifically, Saxe's second defense was that he made the decision to terminate Carter in October 2012. It is this version of events about which Martina testified. Thus, by discrediting this version of events, the ALJ discredits Martina. It is not ALJ's duty to square Martina's testimony with Saxe's inconsistent testimony, particularly because it was Respondents' burden to show that Carter's contract would not have been renewed, even absent her protected concerted activity. *Wright Line*, 251 NLRB 1083, 1089 (1980). The inconsistencies between the respective testimony of Saxe and Martina further highlights the inconsistencies of Respondents' case, and should be viewed as such.

3. Saxe made the decision to discharge Carter, and it is only his intent that is relevant

As the ALJ found, David Saxe made the decision to discharge Carter. (ALJD, p. 24, lines 14-15) As the decision-maker, his intent is what matters. Whatever issues other individuals may have had with Carter are not relevant. The ALJ extensively discredited him and even found that if choosing between Saxe's and Carter's testimony, Carter would win. (ALJD, p. 24, lines 15-16) As described throughout the ALJ's analysis, some of the credited corroborating witnesses also conflict. For example, Kelsey testified that he gave Saxe input about Carter after the

⁶ This is the defense that he denied after the trial resumed. (ALJD, p. 20, lines 16-18).

December 13, 2011 meeting, but Martina testified that Saxe agreed not to renew Carter's contract in October 2011. Moreover, as the ALJ found, Saxe, through the employee contracts, maintained overly-broad provisions that prohibited protected concerted activity and committed numerous violations of 8(a)(1) in response to Carter's protected concerted activity. The ALJ's attempts to buttress Saxe's testimony with other employees and supervisors who did not make the decision, do not change his credibility or motivation.

4. Saxe tolerated Carter's attitude and dancing until the December 13 meeting

The ALJ concluded that Respondents did not condone Carter's poor performance and attitude. (ALJD, p. 23, lines 38-39) The ALJ made this conclusion after discrediting "the latter version of events," which involved Respondents' defense about Carter's dance performance. (ALJD, p. 22, line 32) However, at this point in the decision, the ALJ once again submits that Carter's performance was a basis for her discharge. By relying upon Carter's performance after it had been discredited again shows Respondents' shifting defenses and the confusing credibility findings of the ALJ.

a. Respondents had long tolerated Carter's supposed complaining

The ALJ concluded that Saxe did not condone Carter's performance by renewing and extending previous contracts and hiring her for the BeatleShow. However, the ALJ failed to reconcile how her alleged complaining was tolerated in the past, but then after December 13, 2011, it required that she be discharged. The Board has held that a discharge for conduct that was tolerated in the past tends to establish unlawful motivation. *Garrison Valley Center*, 277 NLRB 1422, 1422 (1985); *American Petrofina Co. of Texas*, 247 NLRB 183, 190 (1980); *Holiday Inn of San Bernadino*, 212 NLRB 280 (1974). *enfd.* as modified 512 F.2d 1171 (9th Cir. 1975). If Carter was so difficult to work with in Vegas! The Show, it does not make any

sense for Respondents to place her in another show and expose those employees to this supposedly intolerable negativity. Saxe directed Ryan to hire dancers from Vegas! The Show, and McCoy and Martina worked with her to prepare her for dancing in the BeatleShow. Respondents were not required to renew Carter's first contract, extend the contract or hire her to perform in the BeatleShow. Obviously, the fact that Respondents did so with knowledge of her alleged dance issues and issues of negativity shows that Respondents did not have a problem with her conduct prior to the December 13, 2011 meeting.

b. Respondents had long tolerated Carter's supposed performance issues

Martina testified that from the beginning of Carter's employment with Vegas! The Show, he had concerns about Carter's performance. He and Saxe testified about pictures showing that Carter and other dancers were not in sync or had the wrong style. (RX 4-8, 9-14) Not only did Saxe not review these pictures⁷ until just before the trial, many of these pictures were taken in August 2010, the month that Vegas! The Show opened. (RX 6, 7, 9, 12, 13) After that time, her contract had been renewed twice and Saxe and Ryan sought her participation in The BeatleShow. Obviously, any issues with Carter's performance had been tolerated. Using these pictures as a basis for Carter's discharge highlights how much Respondents have been working to find "legitimate" reasons to support Carter's discharge.

While Martina may have had concerns about Carter's performance, it was not until after the December 13, 2011 meeting that Saxe decided not to renew Carter's contract. Saxe did not sufficiently explain why it was in December 2011, that Carter's contract was not renewed. The contracts always provided that, with two weeks' notice, Vegas! The Show could release employees from their contracts. (GCX 14, p. 4, 15, p. 4) Previously, Martina had discharged employees on his own (Tr. 690), and employees had been discharged mid-contract. However,

⁷ Ten pictures were chosen from 50,000 Saxe said that he had taken. (Tr. 483)

from Saxe's perspective, there was never a reason to let Carter go until the December 13, 2011 meeting.

c. Saxe did not give Martina's concerns significant weight

Even if the Board finds that Respondents did not tolerate Carter's attitude and complaining and her alleged performance issues, the ALJ erred in using Martina's testimony to support Respondent's *Wright Line* defense. Martina testified that he had misgivings about Carter's performance since her hire and wanted Saxe not to renew her first contract. However, Saxe renewed her contract and did so again. Saxe also placed Carter in the BeatleShow. Obviously, Saxe did not give Martina's input much weight, and using Martina's opinions to support Saxe's discredited testimony is not logical. Moreover, the ALJ discredited Saxe's second version of events, which is the version that relied upon Martina's concerns about her performance. The ALJ cannot have it both ways and discredit Saxe's testimony regarding a subject, and then use it against Carter.

5. The employees' references to complaining included protected concerted activities

The degree that the ALJ found that the employees perceived Carter to be too negative is not supported by the evidence. Specifically, employees repeatedly said that they liked her. If Carter complained as much as the ALJ found, she would not be likeable. Nowak, whom the ALJ credited, did not report any concerns about Carter and even noted that Carter had a good attitude. (ALJD, p. 16, lines 1-3) As the ALJ notes, numerous employees attended Carter's 2011⁸ holiday party. (ALJD. p. 11, lines 33-34) Kelsey refuted that Saxe's statement that the entire cast hated Carter by informing her that was not true. Kelsey said that he hoped that their friendship was not affected by this. He further indicated that Saxe "flies off the handle and doesn't like it when

⁸ The ALJ states that the party was in 2012, but consistent with the testimony it was in 2011, and the instant trial occurred during 2012.

people talk back to him” to explain her discharge. (Tr. 125) This is not consistent with complaint of Carter causing so much negativity that they did not want to be around her.

The ALJ concluded that Carter’s “constant complaining” about work and working conditions can be a legitimate consideration. (ALJD, p. 23, lines 22-25) The ALJ cites *Good Samaritan Hospital*, 265 NLRB 618, 627 (1982), and *Desert Construction*, 308 NLRB 923 (1992), for the proposition that an employee who complains a lot can be discharged. However, in *Good Samaritan*, and *Desert Construction*, Counsel for the General Counsel did not make a prima facie case. The Board found that in each situation, the discharged employees did not engage in protected concerted activity. Here, as the ALJ found, Carter did, indeed, engage in protected concerted activity – protected concerted activity that resulted in her discharge.

The record established that by “complaining,” Carter engaged in protected concerted activity. Dancers Van Samback, Roussel, and Tara Palsha (Palsha) testified about a negative atmosphere backstage. (Tr. 278, 376, 405-06) Palsha testified that Carter complained about rehearsal pay and meet-and-greets, and that these issues were problems for the other employees as well. (Tr. 409) Roussel observed that Carter sometimes complained about working conditions and sometimes had valid points. (Tr. 375) Roussel testified that Carter complained about the meet-and-greets and rehearsal pay. (Tr. 385) Dance captain Mitria testified that Carter was very vocal about meet-and-greets, testified that Carter’s complaints also included the use of part-time employees, holiday pay, rehearsal pay, and cast injuries. (Tr. 361) The ALJD noted that some of the negativity that employees testified about centered around holiday pay, scheduling, injuries, and meet-and-greets. (ALJD, p. 9, lines 27-28) Both the employees who testified and Saxe could not distinguish between individual concerns and protected concerted activities. However, the ALJ gave Saxe the benefit of the doubt by finding that some of Carter’s

complaints were concerted, but noting that she was not sure that Saxe knew of the concerted nature of the complaints in the dressing room. (ALJD, p. 20, n. 26) Saxe should not be given the benefit of the doubt after he prohibited employees from discussing salaries in writing and verbally prohibited, disparaged and threatened employees who engaged in protected concerted activity, and issued discharge notices all in violation of Section 8(a)(1). This inability to understand what is protected and what is not was evidenced the most by Saxe who stated that Roussel complained that Carter indicated that she wanted money for something that did not exist. (Tr. 517) That something was Vegas! The Show, LLC's refusal to pay rehearsal pay, a protected subject of mutual concern. The ALJ amorphously labeled some of her complaints as protected and concerted and then inferred that Saxe must have been responding to those that were not protected when he discharged her. This inference is not supported by the record.

Even if Carter was creating a negative environment with her complaints, tension is often created when employees engage in protected concerted activities. *The O'Hare Hilton*, 248 NLRB 255, 258 (1980) (employees who are "dissident and annoying" due to their protected concerted activity are still protected by the Act). Protected concerted activity that results in perceived "harassment" of employees still receives the protection of the Act. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, at slip op. p. 4 (2012). As stated in *Hispanics United of Buffalo*, quoting *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001), "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity." Whatever concerns Saxe may have had regarding the negativity in the dressing room, discharging Carter for the protected activity is still a violation of Section 8(a)(1).

B. The ALJ erred in failing to find that Respondents DSP and Fab Four Live, LLC discharged Anne Carter in violation of Section 8(a)(1) of the Act. (Exceptions 38-46)

As the ALJ concluded, Carter's non-renewal for Vegas! The Show spurred the decision to discharge her from the BeatleShow. (ALJD, p. 26, lines 46-47) Because Carter's discharge from Vegas! The Show was in retaliation for her protected concerted activities, her discharge from BeatleShow is also a violation of Section 8(a)(1). Saxe discharged Carter from BeatleShow during the same conversation when he was discussing her discharge from Vegas! The Show. He told her that he did not think that she was coming in that night so he took her off the schedule that night and did not schedule her again. (Tr. 123) As shown above, Saxe had the knowledge of and animus towards Carter's protected concerted activity described in reference to her discharge from Vegas! The Show. He did not reference any discussions with McCoy and appears to have discharged her in the same process of discharging her from Vegas! The Show.

In the alternative, if Saxe did rely on his conversation with McCoy before discharging her, the discharge was still a violation of the Act. McCoy testified that she had "confrontational attitude," and not a "team player," and that he relied upon her asking to not move the arrow. (Tr. 441-42) Making inquiries or complaints about safety conditions is concerted activity under the Act. *Unico Replacement Parts*, 281 NLRB 309 (1986). Carter knew that the arrow fell on dancer Van Sambeck, and was concerned about whether it was safe. McCoy discussed this as a reason not to discharge Carter. As the ALJ found, Carter engaged in protected concerted activity when she complained about moving the arrow on the BeatleShow set. (ALJD, p. 26, lines 25-27)

McCoy discussed how he was not sure if Carter had the right style despite his seeing her dance during rehearsals six months earlier in his quest to have better dancers in Vegas! The Show. (Tr. 452-53, 454) Martina conducted a series of rehearsals for the BeatleShow dancers

and did not testify about his evaluation of Carter's performance in that show. Carter testified that Martina told the dancers what style to create for their hair and make-up. (Tr. 105) Martina's failure to testify warrants an inference that, if called, Martina's testimony would have been adverse to Respondent's case. *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977). Thus, Martina should be considered to have testified that Carter had the right style and McCoy's concern about Carter's style should be discredited as pretextual.

C. The ALJ erred in failing to include in the Notice that the illegal contract provisions be rescinded. (Exceptions 47-48)

The ALJ found that the non-disclosure clause and the non-union clauses violated Section 8(a)(1) of the Act. (ALJD, p. 14, lines 27-29; p. 15, lines 24-25) The ALJ included these conclusions in the Conclusions of Law, Remedy, and Proposed Order. (ALJD, p. 27, lines 11-14, 32-34, 36-39; p. 28, lines 14-18, 30-36) However, the Notice does not include a remedy to cease and desist and rescind these contractual provisions. This appears to be an oversight that should be corrected for a complete remedy.

Secondly, the Notice should be to "employees" and not "employees and members," as it currently states. (ALJD, Appendix) Because Respondents are not labor organizations, a notice to members is not appropriate.

D. Respondents Vegas! The Show, LLC and DSP and Fab Four Live, LLC and DSP are Joint Employers, respectively (Exception 1)

The ALJ correctly found that Vegas! The Show, LLC and David Saxe Productions, LLC (DSP) and Fab Four Live, LLC and DSP are single employers (ALJD, p. 13, lines 24-25) However, the ALJ failed to conclude whether they are joint employers.

1. Law Regarding Joint and Single Employer Status

The ALJ correctly stated the standard for finding companies to be joint employers:

A joint employer relationship exists where companies amounting to independent legal entities have chosen to handle jointly important aspects of their employer-employee relationship. It is not necessary to demonstrate that the various entities form a single integrated enterprise. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122-23 (3rd Cir. 1982). The standard in a joint employer finding is here two entities exert significant control over the same employees, and where it can be shown that these two entities share or co-determine matters governing their essential terms and conditions of employment. See *Capitol EMI*, 311 NLRB 997, 999 (1993); *Marcus Management*, 292 NLRB 251, 259 (1989). A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881 (1995); *Browning –Ferris Industries*, supra at 1123. (ALJD, p. 12, lines 1-11)

The ALJ failed, however, to analyze whether the entities were in fact, joint employers.

2. Vegas! The Show, LLC and DSP are Joint Employers

As the ALJ concluded, “DSP, Vegas! The Show, LLC and Fab Four Live, LLC maintain centralized control of labor relations Saxe was the sole member of both Vegas! The Show, LLC and DSP. David Saxe⁹ (Saxe) controlled the labor relationship of both employees of Vegas! The Show, LLC and Fab Four Live, LLC (ALJD, p. 13, lines 16-18) He controlled all of the companies. Saxe made the decisions regarding whom to hire and discharge and established the terms and conditions of their employment. According to Saxe, DSP performed the “office stuff” for his companies. (Tr. 45) Saxe did not bill hours or distinguish for whom he was performing work among the companies he controlled. (Tr. 63-64) Matthew Resler, vice president and general manager of DSP was present when Carter’s contract with The Show was renewed. (Tr. 169, 696) These companies each had their own limited liability corporation status (LLC). Saxe created Vegas! The Show and uses DSP to implement the policies to support it. Whether it

⁹ Throughout the Exceptions to the Decision of the Administrative Law Judge and this brief in support, Counsel for the Acting General Counsel has deferred to the ALJ’s credibility findings, but does at times, take issue with how much weight to give testimony, which part of the testimony to rely on, and how conflicting credited testimony should be resolved.

was Managed Pay or DSP itself, DSP directed the human resources matters. (GCX 33, 36, 47-41, 49) Saxe was the final arbiter or all issues for both companies. His control over the labor relations policies of DSP and Vegas! The Show, LLC makes them joint employers.

3. Fab Four Live, LLC and DSP are Joint Employers

DSP and Fab Four Live, LLC had a similar relationship with Saxe as DSP and Fab Four Live, LLC do. Saxe was the sole member of DSP and a 50% partner of Fab Four Live, LLC. (Tr. 25) Saxe controlled labor relations at Fab Four Live, LLC and worked out of his office at DSP. (Tr. 36-37) As the ALJ concluded, “It was Saxe who decided to use dancers from Vegas! The Show to perform in the BeatleShow, and Saxe who informed Carter of her discharge from both.” (ALJD, p. 13, lines 18-20) The ALJD further concluded that “DSP employees processes payroll and deal with any legal issues that arise with respect to the dancers’ employment.” (ALJD, p. 13, lines 21-22) That was the case for Fab Four Live, LLC as well as Vegas! The Show, LLC. Saxe admitted that if someone tried to collect unemployment benefits from Fab Four Live, LLC, he would contact someone at DSP for assistance. (Tr. 612) Saxe controlled the labor relations and did not differentiate whether he was representing DSP or Fab Four Live, LLC, and thus, DSP and Fab Four Live, LLC are joint employers.

E. Kelsey and Mitria are supervisors and agents under the Act (Exception 2)

The ALJ declined to determine whether dance captains Kelsey and Mitria are supervisors and agents under the Act. (ALJD, p. 13, lines 27-32) Counsel for the Acting General Counsel urges that the Board find them to be supervisors and agents of Vegas! The Show.

Under Section 2(11) of the Act, the term supervisor means:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such

action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of authority to engage in any one of the enumerated supervisory functions is sufficient to confer supervisory status on an individual, provided the authority is held in the interest of the employer and its exercise is not of a merely routine or clerical nature but requires the use of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The alleged individuals possessed the supervisory indicia outlined in Section 2(11) of the Act. See similarly, *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 660-61 (2007), where the Board found that individuals with the authority to, among other things, discipline employees and assign work are statutory supervisors. Because these individuals are statutory supervisors, their actions are imputed to Respondent, which makes them statutory agents under Section 2(13) of the Act. See *Oakwood Healthcare, Inc.*, supra. at 687.

Mitria and Kelsey “kept the integrity” of Vegas! Show and were the first level supervisors of the dancers throughout Carter’s employment. (Tr. 287) Pursuant to consultation with Tiger Martina (Martina) and their own observations of videos, they gave dancers “notes,” which are corrections to their performance. (Tr. 326) These notes were generally given at the 6:00 PM meeting. (Tr. 98, 143, 171, 227, 244, 291, 326) Saxe consulted with Kelsey and Mitria as well as Martina about each dancer before determining whether to renew a dancer’s contract. (Tr. 299, 349, 367, 507) Thus, they could effectively recommend, which in and of itself is sufficient to conclude that they are supervisors. See *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004). Although both Mitria and Kelsey performed in Vegas! The Show, witness after witness testified that they reported to Kelsey and Mitria. After Nowak became a part-time employee, Mitria and Kelsey told her when she was scheduled to work. (Tr. 246)

Before former Stage Manager Ryan's discharge, Mitria and Kelsey performed some scheduling. (Tr. 326) However, their supervisory role expanded after Ryan was discharged. At that time, Kelsey and Mitria took over all of the scheduling. (Tr. 326) As Mitria testified, it was the dance captains' responsibility to make sure that there was a complete cast to perform each night. (Tr. 326) Mitria and Kelsey were the only dance supervisors at the Theater on a daily basis. Saxe was at the Theater only about twice per month and Martina was not present consistently. (Tr. 97, 151, 655, 677) Mitria and Ryan were also paid a premium for their position. While Carter and Nowak were paid \$70.84 per show (GCX 14-15, 30-31), Mitria and Ryan were paid \$83.34 and \$100 per show, respectively. (Tr. 251) While not dispositive of the requirements of supervisory status, In re *Ferguson Electric Co., Inc.*, 335 NLRB 142, 147 (2001), it does reflect that Mitria and Ryan had a separate status within Vegas! The Show's hierarchy.

Mitria and Ryan were supervisors because they responsibly directed and effectively recommended employment actions including whether employees' contracts were renewed. As discussed throughout the instant record, these were not routine duties, but rather duties that had to be performed well or the show "would not go on."

F. The ALJ erred in failing to find that Saxe promulgated a rule prohibiting employees from discussing working conditions (Exceptions 3-5)

The ALJ concluded that there is "no meaningful difference between the allegation set forth in Complaint paragraph 4(c)(2) (of the complaint) that Saxe prohibited concerted activity and the allegation that he promulgated an overly-broad and discriminatory rule prohibiting complaints about wages and hours." (ALJD, p. 18, lines 7-9) However, this promulgation was an additional unfair labor practice that is an additional violation and should be found as such. During the meeting on December 13, 2011, Carter said that meet-and-greets were causing time

constraints and that those constraints were aggravated by shows that started late. (Tr. 120, 229-30, 239) Saxe said that he understood, but he did not want all this “bitching.” (Tr. 120) Saxe’s prohibition against “bitching” amounted to a rule that employees could not engaged in protected concerted activity. There is no issue as to what the “bitching” was other than protected concerted activity and thus, the statement violates Section 8(a)(1) of the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Particularly, as Saxe had been using the term, “bitching” had become a synonym for protected activity and his prohibiting it is an overbroad rule that violated the Act.

VII. CONCLUSION

Counsel for the Acting General Counsel respectfully requests that the Board grant its Exceptions and modify the Administrative Law Judge’s Decision accordingly.

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